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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 293

JAYBIRD MINING COMPANY, PLAINTIFF IN ERROR,

**JOE WEIR, AS COUNTY TREASURER OF OTTAWA
COUNTY, OKLAHOMA**

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED FEBRUARY 24, 1926

(30,894)

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(30,894)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 929

JAYBIRD MINING COMPANY, PLAINTIFF IN ERROR,

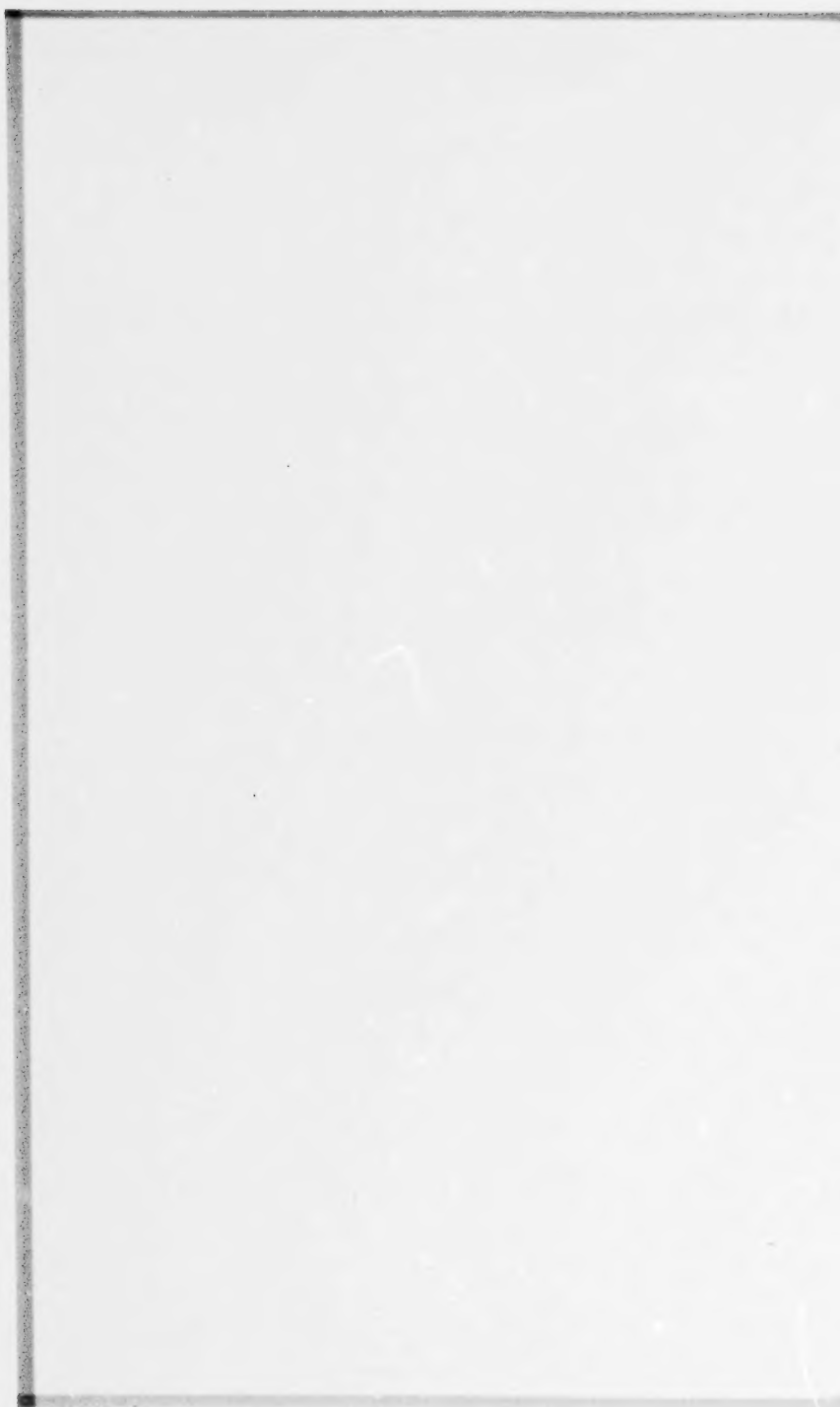
vs.

JOE WEIR, AS COUNTY TREASURER OF OTTAWA
COUNTY, OKLAHOMA

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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[fol. a] **IN SUPREME COURT OF OKLAHOMA****RETURN TO WRIT OF ERROR**

In obedience to the commands of the with- Writ I herewith transmit a full, true and complete transcript of the record and all proceedings in the within entitled cause.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 15th day of January, 1925.

William M. Franklin, Clerk Supreme Court Oklahoma, by
Jessie Pardoe, Deputy. (Seal Supreme Court, State of
Oklahoma.)

[fol. 1] CITATION—In usual form, showing service on J. H. Venable; filed January 15, 1925; omitted in printing

[fol. 2] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

JAYBIRD MINING COMPANY, a Corporation, Plaintiff in Error,

vs.

JOE WEIR, County Treasurer of Ottawa County, Oklahoma,
Defendant in Error

PETITION FOR AND ORDER ALLOWING WRIT OF ERROR—Filed January 9, 1925

To the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, and Associate Justices of said Court:

Now comes Jaybird Mining Company, a corporation, plaintiff in error herein, and would show unto this Honorable Court that in the record and proceedings, and rendition of the judgment in the above cause by the Supreme Court of the State of Oklahoma on December 9, 1924, it being the highest court of said State in which a decision could be had on the said suit between the parties above named, manifest error has occurred, greatly to its damage, whereby petitioner feels aggrieved.

That in the record and proceedings it will appear that there was drawn in question the validity of a statute, treaty and authority exercised under the United States, and the decision was against their validity, and there was drawn in question the validity of a statute

of the State of Oklahoma and authority exercised thereunder repugnant to the Constitution, a treaty, and law of the United States, and the decision was in favor of their validity, and there was drawn in question the construction of the Constitution of the United States, a treaty with the Quapaw Indians, and a statute of the United States, and the decision was against the right, title, privilege and exemption specially set up or claimed thereunder by this plaintiff in error. The particular questions involved were: The right of plaintiff in [fol. 3] error to an exemption from tax by the State of Oklahoma on its lead and zinc ores in gross and in the bin, produced under and pursuant to the terms of a mining lease held by it and executed by the Honorable Secretary of the Interior upon the allotment of a Quapaw Indian allotted under the Act of Congress approved March 2, 1895 (28 Stats. p. 907), and leased pursuant to the authority of the Act of Congress approved June 7, 1897 (30 Stats., p. 72); all of which is fully apparent in the record and proceedings of the case and specifically set forth in the assignment of errors filed herewith.

Wherefore petitioner prays that his appeal be allowed, writ of error issue, and that a transcript of the record, proceedings and papers upon which said orders and decrees were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said Court in such cases made and provided, that the same may be inspected and corrected as according to law and justice should be done.

Jaybird Mining Co., Petitioner and Plaintiff in Error, by
A. Scott Thompson, Its Attorney.

Order

The above petition is granted, the writ of error shall issue as prayed for upon the plaintiff in error giving bond conditioned as the law directs, in the sum of \$2,000.00, which when approved shall operate as a supersedeas and stay of mandate, and that a true copy of the record, assignment of errors, and all proceedings had in the case in the Supreme Court of Oklahoma, shall be transmitted to the Supreme Court of the United States, properly certified as the law directs, that [fol. 4] the said Court may inspect the same and do what according to law should be done.

Dated this 9th day of January, 1925.

N. E. McNeill, Chief Justice of the Supreme Court of the
State of Oklahoma. (Seal Supreme Court, State of Oklahoma.)

Attest: Wm. M. Franklin, Clerk Supreme Court of the State of
Oklahoma, by Jessie Pardoe, Deputy.

[fol. 5]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 9, 1925

Comes now Jaybird Mining Company, a corporation, plaintiff in error in the above entitled cause, and respectfully shows that in the trial of said cause and in the rendition of judgment of the Supreme Court of the State of Oklahoma, and in the opinion filed therein in said cause, manifest errors were committed to its prejudice, which are apparent in the record therein; that the errors committed by the Supreme Court of the State of Oklahoma in the opinion and judgment therein, in said cause, are more fully and particularly set forth as follows:

I

The Supreme Court of the State of Oklahoma erred in reversing the judgment of the District Court of Ottawa County, Oklahoma, and directing that judgment should be entered by said District Court in favor of the defendant in error herein.

II

The Supreme Court of the State of Oklahoma erred in refusing to affirm the decision of the District Court of Ottawa County, Oklahoma.

III

The Supreme Court of Oklahoma erred in holding, deciding and determining the statute of the State of Oklahoma approved February [fol. 6] 14, 1916, and being Chapter 39 of Session Laws of the State of Oklahoma, extra session, page 102, imposing gross production taxes, are valid, and rendering a decision in favor of its validity, and in not holding it repugnant to the Constitution, treaties and laws of the United States.

IV

The Supreme Court of Oklahoma erred in holding, deciding and determining that the acts of the Treasurer of Ottawa County, Oklahoma, and the authority exercised by him under the State of Oklahoma, conferred and vested by the statute mentioned in Specification or Assignment of Error No. 3 preceding, and other statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax, are and were valid, and rendering a decision in favor of their validity, and in not holding them repugnant to the Constitution, treaties and laws of the United States.

V

The Supreme Court of Oklahoma erred in sustaining the validity of the gross production tax law above specified and the statutes of the State of Oklahoma authorizing the assessment of an ad valorem tax on lead and zinc ores in the bin on January 1 of the current year, upon such ores unsold of the plaintiff in error herein, derived and produced solely from lead and zinc mining leases upon restricted Indian lands under the control of Congress and the Secretary of the Interior.

VI

The Supreme Court of Oklahoma erred in reversing the judgment or decree of the District Court of Ottawa County, Oklahoma, and in holding and denying that plaintiff in error was exempt from ad valorem tax upon the property so charged, claimed by the plaintiff in error under the Constitution, treaties and laws of the United States.

[fol. 7] For which errors the said Jaybird Mining Company, plaintiff in error, prays that the judgment of the Supreme Court of the State of Oklahoma be reversed, and that the Supreme Court of the State of Oklahoma be directed to affirm the judgment of the District Court of Ottawa County, Oklahoma, as rendered; and for such other and further relief as to the Court may seem just and proper, and for its costs.

A. Scott Thompson, Attorney for Plaintiff in Error.

[fol. 8]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

WRIT OF ERROR—Filed January 9, 1925

The President of the United States to the Honorable Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Court before you or similar to you, between Jaybird Mining Company, a corporation, plaintiff in error, and Joe Weir, as County Treasurer of Ottawa County, Oklahoma, defendant in error, your court being the highest court of said State having jurisdiction to render judgment in the case; there was drawn in question the validity of a statute, treaty and authority exercised under the United States, and the decision was against their validity, and there was drawn in question the validity of a statute of the State of Oklahoma and authority exercised thereunder repug-

nant to the Constitution, a treaty, and law of the United States, and the decision was in favor of their validity, and there was drawn in question the construction of the Constitution of the United States, a treaty with the Quapaw Indians, and a statute of the United States, and the decision was against the right, title, privilege and exemption specially set up or claimed thereunder by the plaintiff in error. The particular questions involved were: The right of plaintiff in error to an exemption from tax by the State of Oklahoma on its lead and zinc ores in gross and in the bin, produced under and pursuant to [fol. 9] the terms of a mining lease held by it and executed by the Honorable Secretary of the Interior upon the allotment of a Quapaw Indian, allotted under the Act of Congress approved March 2, 1895 (28 Stats. p. 907); and leased pursuant to the authority of the Act of Congress approved June 7, 1897 (30 Stats., p. 72), and there being manifest error in said decision, greatly to the damage of the Jaybird Mining Company, plaintiff in error, and we being willing that if there is error it should be duly corrected, we do therefore command you, if judgment be therein given, that under the seal of your Court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this writ, so that you have same at Washington on the 9th day of February, A. D. 1925, in the Supreme Court to be then and there held, that the record may be inspected by said Court and justice done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court, the 9th day of January, year of our Lord 1925.

Harry L. Finley, Clerk United States District Court for the Western District of Oklahoma. (Seal of the Supreme Court, Western District of Oklahoma.)

Approved and allowed by the Honorable N. E. McNeill, Chief Justice of the Supreme Court of the State of Oklahoma, this 9th day of January, 1925.

N. E. McNeill, Chief Justice Supreme Court of Oklahoma.

Attest: Wm. M. Franklin, Clerk of the Supreme Court of the State of Oklahoma, by Jessie Pardoe, Deputy. (Seal of Supreme Court, State of Oklahoma.)

[fols. 10 & 11] BOND ON WRIT OF ERROR FOR \$2,000—Approved and filed January 9, 1925; omitted in printing

[fol. 12]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed January 9, 1925

To the Clerk of the Supreme Court of Oklahoma:

You are hereby requested to at once prepare transcript for the United States Supreme Court in the above entitled cause, being Joe Weir, County Treasurer of Ottawa County, Oklahoma, Plaintiff in error, vs. Jaybird Mining Company, a corporation, Defendant in Error, No. 14,059 in your *cour.* In the preparation of this transcript you will insert the following:

1. Petition for writ of error.
 2. Assignments of error presented therewith.
 3. Order allowing the writ and fixing bond.
 4. Bond of plaintiff in error, showing approval.
 5. Writ of error issued.
 6. Citation to defendant in error, and return thereof.
 7. Copy of case made and transcript filed in the Supreme Court of Oklahoma.
 8. Order showing filing of said case made and transcript.
 9. Order of court submitting cause on briefs.
 10. Opinion of the Supreme Court of Oklahoma filed October 21, 1924.
 11. Order and judgment of Supreme Court of Oklahoma.
 12. Order filing petition for rehearing herein by plaintiff in error.
 - [fols. 13 & 14] 13. The order overruling and denying petition for rehearing, showing the date of filing thereof.
 14. Order staying mandate, showing filing thereof.
 15. Petition for rehearing.
 16. All minutes of the Clerk and all orders made and entered in said cause in the Supreme Court of Oklahoma.
 17. Copy of this præcipe.
- Jaybird Mining Company, by A. Scott Thompson, Its Attorney.

[fol. 15]

[File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION IN ERROR—Filed January 10, 1923

The said Joe Weir, as County Treasurer of Ottawa County, Oklahoma, plaintiff in error, complains of the said Jaybird Mining Com-

pany, a corporation, defendant in error for that the said defendant in error at the May, 1922, term of the District Court of Ottawa County, State of Oklahoma, recovered a judgment, by the consideration of said court against the said Joe Weir, County Treasurer of Ottawa County Oklahoma, in a certain action then pending in the said court, wherein the said Jaybird Mining Company, a corporation was plaintiff, and the said Joe Weir, County Treasurer of Ottawa County Oklahoma was defendant. A certified transcript of the record of said court is hereunto attached, marked "Exhibit A," and made a part of this petition in error; and the said Joe Weir, County Treasurer of Ottawa County, Oklahoma, avers that there is error in said record and proceedings, in this to-wit:

(1) That said court erred in overruling the demurrer of the defendant, to the petition of the plaintiff.

(2) That said court erred in not rendering judgment for the plaintiff in error, and in failing to sustain the demurrer to the petition.

(3) The said court erred in rendering judgment against the plaintiff in error, and for the defendant in error.

[fols. 16 & 17] Wherefore the plaintiff in error prays, that said judgment so rendered may be reversed, set aside and held for naught, and that a judgment may be rendered in favor of the plaintiff in error, and against the defendant in error, and that the plaintiff in error be restored to all rights that he has lost by the rendition of such judgment, and for such other and further relief as the court may deem just.

Joe Weir, County Treasurer of Ottawa County, Oklahoma,
Plaintiff in Error, by A. L. Commons, County Attorney of
Ottawa County, Oklahoma, and John H. Veneable, As-
sistant County Atty., Miami.

STATE OF OKLAHOMA,
County of Ottawa, ss:

DISTRICT COURT

This instrument was filed for record Jan. 5, 1923.

Geo. M. Henderson, Court Clerk, by Ethel McGrew, Deputy.

[fol. 18] IN DISTRICT COURT OF OTTAWA COUNTY

No. —

JAYBIRD MINING COMPANY, a Corporation, Plaintiff

vs.

JOE WEIR, County Treasurer of Ottawa County, Oklahoma, Defendant

PETITION—Filed January 28, 1922

Comes now the plaintiff and states:

1. That it is a corporation organized and existing under the laws of the State of Oklahoma and engaged in the mining of lead and zinc ores in Ottawa County, Oklahoma. That the defendant is and was at all times mentioned herein the duly elected, qualified and acting County Treasurer of Ottawa County, State of Oklahoma, and was the collecting officer for taxes of said County for the year 1921.

2. That the Congress of the United States on March 2, 1895 (28 Stat. page 907) enacted the following statute:

Be it enacted, etc., That the allotments of land made to the Quapaw Indians in the Indian Territory in pursuance of an act of the Quapaw National Council approved March 23, 1893, be, and the same is hereby ratified and confirmed, subject to revision, correction and approval by the Secretary of the Interior: Provided, however, that any allottee who may be dissatisfied with his allotment shall have all the rights to contest the same provided for in said act of the Quapaw National Council, subject to revision, correction and approval by the Secretary of the Interior. And the Secretary of the Interior is hereby authorized to issue patents to said allottees in accordance therewith: Pro-[fol. 19] vided, said allotments shall be inalienable for the period of twenty-five years from and after the date of said patents."

That pursuant to authority granted in said act the said Secretary of the Interior caused a patent to be issued to Humbahwattah Quapaw, a member of the Quapaw tribe of Indians, for an allotment of land, a portion of said land so patented being the Southwest Quarter of the Northeast Quarter of Section 30, Township 29 North, Range 23 East of the Indian Meridian in said County and state, and that said patent contained restrictions against alienation for the period of twenty five years from the date thereof, the 26 day of September, 1896. That the restrictions against alienation on said lands were further extended by Act of Congress dated March 3, 1921, for an additional period of 25 years thereafter.

That the Congress of the United States, on June 7, 1897 (30 Stats. page 72) enacted the following statute:

"That the allottees of land within the limits of the Quapaw Agency, Indian Territory, are hereby authorized to lease their lands

or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining and business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary: Provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability any such allottee cannot improve or manage his allotment properly and with benefit to himself, the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

That the Quapaw Indians were within the limits and jurisdiction [fol. 20] of the Quapaw Agency and came within the provisions of the last mentioned leasing statute, and that the lands above described have been at all times and now are subject to the restrictions and limitations imposed in said act of Congress and patent issued therefor and are now owned by the lawful heirs of said allottee.

3. That this plaintiff is now and has been for several years last past operating a lead and zinc mine upon the above described property, and did have in its ore bins on January 1, 1921, a quantity of lead and zinc ores mined during the year 1920. That this plaintiff mined said ore pursuant to its right obtained under a mining lease executed under the terms of the leasing statute above named, and approved by the Secretary of the Interior pursuant to said leasing statute above mentioned. That the said allottee and her heirs have been at all times and now are wards of the United States Government, and that pursuant to the authority granted in the said leasing statute and carrying out the policy of the United States Government, the Secretary of the Interior had, prior to the production of said minerals, declared said Indian land-owners to be incapable of managing their allotment with benefit to themselves, and assumed control and management of the mining of said lands for and on behalf of said Indian owners, and that since said Secretary of the [fol. 21] Interior has assumed said control all royalties accruing on ores mined from said land have been paid direct to the said Secretary of the Interior.

That Congress by such leasing statute expressed the policy of the Federal Government of leasing Quapaw lands and securing the development of minerals thereunder for the benefit of the Indian owners and at all times retained control thereof in the Secretary of the Interior. That in carrying out the terms of the mining lease executed on the above described lands this plaintiff is complying with and carrying out the terms of a Federal agency as expressed in said leasing statute and the policy of the Government in protecting and developing the mineral lands of its Indian wards.

That on January 1, 1921, the ores in the bin on said lands were in mass, the royalty or equitable interest of the Indian not having been segregated or paid, the terms of the lease providing for payment of a royalty or percentage of the gross proceeds derived from the sale thereof.

4. That this plaintiff has paid to the Auditor of the State of Oklahoma, pursuant to Chapter 39 of the Session Laws of 1916 of the State of Oklahoma, a gross production tax on the ores so assessed when sold, and during the tax year in which same was produced and prior to June 30, 1921, and that the State of Oklahoma or the taxing officials of Ottawa County have no constitutional authority [fol. 22] to assess the same ore again on an ad Valorem basis.

5. That the taxing officials of Ottawa County in the State of Oklahoma, for the year 1921, without notice to or knowledge of the Plaintiff, wrongfully and unlawfully, and without authority, caused the ores in the bins of this plaintiff on said land on January 1, 1921, to be assessed an ad valorem tax in the amount of \$2,319.80. That said levy and assessment and tax is in its entirety void, illegal and unauthorized for the reasons set forth above.

6. That this plaintiff, did, on the 31st day of December, 1921, pay to defendant, Joe Weir, as County Treasurer of Ottawa County, Oklahoma, the sum of \$1,159.90, being one half of the total amount of taxes assessed to this plaintiff against the ores hereinbefore mentioned and described, and that said sum of money in its entirety was paid as aforesaid and under protest for the reasons hereinbefore set out. That at the time of said payment this plaintiff delivered to the defendant its protest in writing, a copy of which protest is hereto attached, marked Exhibit "A," and made a part hereof. That such taxes were not paid voluntarily, but under protest and compulsion, and said defendant was notified not to disburse said sums and that suit would be brought for the recovery thereof.

7. The plaintiff further states that said taxing officials are without authority of law to make said assessment and that said ores are [fol. 23] free from tax because of the facts as plead above.

Wherefore, premises considered, plaintiff prays judgment of this court in its favor and against the said defendant in the sum of \$1,159.90 with interest thereon and costs of this action.

A. Scott Thompson, Attorney for Plaintiff.

[fol. 24]

EXHIBIT "A" TO PETITION

To Joe Weir, County Treasurer of Ottawa County, in the State of Oklahoma:

Herewith is delivered to you the sum of \$1,159.90 to cover one-half ad valorem tax on lead and zinc ores assessed as on hand on January 1, 1921, and produced from the following described land in Ottawa County, Oklahoma, to wit:

The Southwest Quarter of the Northeast Quarter of Section 30, Township 29 North, Range 23 East,

which said payment of tax as aforesaid is made under protest for the reason that said ores so attempted to be assessed and upon which the aforementioned tax is based and sought to be collected by our office was produced on the lands hereinbefore described, which said land was patented to Hum-bah-wa-tah Quapaw, a Quapaw Indian, under Act of Congress approved March 2, 1895, said patent containing restrictions against alienation for a period of twenty-five years from the date thereof, to wit, the — day of September, 1895; that said lands were leased for mining purposes under Act of Congress approved June 7, 1897; that the ores so attempted to be assessed and upon which the tax herewith paid was levied and is now sought to be collected by your office, had not been serered as between the lessee and lessor, and that no payment of royalty had been made on said ore at said time of assessment; that at the time of said at-[fol. 25] tempted assessment this protestant, lessee under said lease of the herein described lands, was a federal agency, and that said ores so attempted to be taxed were not subject to tax under any taxing laws of the State of Oklahoma; that said lands are still held and owned by the allottee or his heirs, and restrictions against alienation have not been removed, but have in fact been extended by act of Congress, and said land is non-taxable for any purpose, and the product therefrom is not subject to tax for the reasons stated above; that the Secretary of the Interior under said acts of Congress has reserved the right unto himself to control and supervise all such mining leases on said lands, and said Secretary is in fact in control of and receiving the royalties on ores produced on said lands for and on behalf of said Indian owners; that the tax sought to be levied and collected by Ottawa County and the State of Oklahoma is an attempt upon the part of said county and state to lay a burden or tax on a federal agency and is unlawful and unauthorized.

That this protestant has paid or will pay to the State Auditor of the State of Oklahoma a gross production tax as provided by the statutes of the State of Oklahoma on said ores during the tax year in which same was produced, and said ad valorem tax is for such reason unauthorized and without authority of law.

[fol. 26] You are therefore requested not to disburse any part of said tax paid herewith and are advised that suit will be brought against you as such County Treasurer for the recovery of tax paid herewith, in the time and manner provided by the statutes of the State of Oklahoma relating thereto.

Jaybird Mining Co., by R. J. Tuthill, Auditor.

Received payment of the tax mentioned in the herewith attached protest and at the same time received a true and correct copy of the hereto attached protest.

— — —, County Treasurer of Ottawa County, Oklahoma.

[File endorsement omitted.]

[fol. 27] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

PRÆCIPE FOR SUMMONS—Filed January 28, 1922

To the Clerk of said Court:

Please issue summons in above entitled action, and direct same to Sheriff of Ottawa County, State of Oklahoma, to serve in his County, on Joe Weir as Treasurer of Ottawa County, Oklahoma, the defendant in said action.

Make summons returnable the 4th day of February, 1922.

Make answer day on or before the 25th of February, 1922.

Endorse thereon, action brought for money judgment.

Amount sued for \$1,159.90 and interest thereon at 6 per cent from the 31st day of Dec. 1921.

Dated this 28th day of January, 1922. Attorney Fee —.

A. Scott Thompson, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 28] IN DISTRICT COURT OF OTTAWA COUNTY

OTTAWA COUNTY:

[Title omitted]

SUMMONS AND SHERIFF'S RETURN—Filed January 30, 1922

To the Sheriff of Ottawa County, Greeting:

You are hereby commanded to notify Joe Weir as County Treasurer of Ottawa County, Oklahoma, that he has been sued by Jaybird Mining Company in the District Court of Ottawa County, Oklahoma, and that he must answer the petition of said Jaybird Mining Company filed against him in said Court, in the City of Miami, in said County on or before the 25th day of February, 1922, or said petition will be taken as true and judgment rendered accordingly.

Your will make return of this summons on or before the 4th day of February, 1922.

Given under my hand and the seal of said Court, this 28th day of January, 1922.

Geo. M. Henderson, Court Clerk. J. W. Dewey, Deputy.
(Seal.)

[fol. 29] Suit brought for money judgment. If defendant fail to answer, plaintiff will take judgment in the sum of \$1,159.90 with interest at the rate of 6 per cent per annum from the 31st day of Dec. 1921 and cost of suit.

Geo. M. Henderson, Court Clerk, by J. W. Dewey, Deputy.
(Seal.)

Received this writ Jan. 28, 1922 at 3 o'clock P. M. and served the same upon the following persons, defendants within named, at the times following, to wit: Joe Weir, as County Treasurer of Ottawa County, Okla., Jan. 28, 1922, by delivering to said defendant, personally in said county a true and certified copy of the within summons, with all the endorsements thereon.

Neil Harr, Sheriff, by N. C. Cox, Deputy.

Sheriff's Fees:

Service and return, first person	\$.50
1 copy of summons25
Total75

[File endorsement omitted.]

[fol. 30] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

DEMURRER—Filed June 20, 1922

Comes now the above named defendant and demurs to plaintiff's petition in the within cause for the reason that it does not state facts sufficient to constitute a cause of action.

Louis N. Stivers, Attorney for Defendant.

[File endorsement omitted.]

[fol. 31] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

STIPULATION RE TAXES PAID UNDER PROTEST—Filed July 1, 1922

It is hereby stipulated and agreed by and between the plaintiff and the defendant as follows:

1. That since the institution of the above and foregoing suit to recover taxes paid under protest upon the first half — the 1921 taxes, which said plaintiff claims to be the produce of illegal levies, the last half of said taxes for said year 1921 have been paid by said plaintiff under protest on the 15th day of June, 1922; that upon such payment being made under protest a notice in writing was delivered to the defendant herein setting forth the reasons for the illegality of said levy of tax. A copy of such written protest is hereto attached, marked Exhibit "A", and made a part of this stipulation.

2. It is further stipulated and agreed by and between the plaintiff and defendant in this case that the plaintiff's cause of action con-[fol. 32] tained in the petition herein may be considered as amended so as to include plaintiff's claim to the last half of the taxes of said taxing jurisdiction for the year 1921 paid by said plaintiff and covered by the protest attached hereto, and that the amount prayed for in said petition filed herein shall be increased by the addition of the amount so paid, making the total amount of \$2,319.80 as prayed for in the judgment herein, and that no separate action for the recovery thereof need be brought by plaintiff.

3. It is further stipulated and agreed by and between the parties hereto that said defendant and his successor or successors in office will hold said amounts so paid under protest, and in the event plaintiff is successful in this suit as to the first half of said taxes involved in the plaintiff's cause of action, or any part thereof, for the year of 1921, then the said defendant will pay to said plaintiff the amount of said illegal levies covered by the protest attached hereto or such sum or sums as may be finally adjudged by the court to be due said plaintiff.

This 30th day of June, 1291.

Jay Bird Mining Company, by A. Scott Thompson, Its Attorney. Joe Weir, County Treasurer of Ottawa County, Oklahoma, by O. F. Mason, County Attorney.

[fol. 33]

EXHIBIT "A" TO STIPULATION

To Joe Weir, County Treasurer of Ottawa County, in the State of Oklahoma:

Herewith is delivered to you the sum of \$1,159.90 to cover one half ad valorem tax on lead and zinc ores assesses as on hand on January 1, 1921, and produced from the following described land in Ottawa County, Oklahoma, to wit:

The Southwest quarter of the Northeast Quarter of Section 30, Township 29 North, Range 23 East, which said payment of tax as aforesaid is made under protest for the reason that said ores so attempted to be assessed and upon which the aforementioned tax is based and sought to be collected by your office was produced on the lands hereinbefore described, which said lands were patented to Hum-ah-wat-tah Quanaw a Quanaw Indian, under Act of Congress approved March 2, 1895, said patent containing restrictions against alienation for a period of twenty-five years from the date thereof, to wit, the — day of September, 1896, that said lands were leased for mining purposes under Act of Congress approved June 7, 1897; that the ores so attempted to be assessed and upon which the tax herewith paid was levied and is now sought to be collected by your office had not been severed as between the lessee and lessor, and

that no payment of royalty had been made on said ore at said time of assessment; that at the time of said attempted assessment this protestant, lessee under said lease of the herein described lands, [fol. 34] was a federal agency, and that said ores so attempted to be taxed were not subject to tax under any taxing laws of the State of Oklahoma; that said lands are still held and owned by the allottee or his heirs, and restrictions against alienation have not been removed, but have in fact been extended by Act of Congress, and said land is non-taxable for any purpose, and the product therefrom is not subject to tax for the reason stated above; that the Secretary of the Interior under said acts of Congress has reserved the right unto himself to control and supervise all such mining leases on said lands, and said Secretary is in fact in control of and receiving the royalties on ores produced on said lands for and on behalf of said Indian owners; that the tax sought to be levied and collected by Ottawa County and the State of Oklahoma is an attempt upon the part of said county and state to lay a burden or tax on a federal agency and is unlawful and unauthorized.

That this protestant has paid or will pay to the State Auditor of the State of Oklahoma a gross production tax as provided by the statutes of the State of Oklahoma on said ores during the tax year in which same was produced, and said ad valorem tax is for such reason unauthorized and without authority of law.

You are therefore requested not to disburse any part of said tax paid herewith and are advised that suit will be brought against you [fol. 35] as such County Treasurer for the recovery of tax paid herewith, in the time and manner provided by the statutes of the State of Oklahoma relating thereto.

Jaybird Mining Company, by R. J. Tuthill.

Miami, Oklahoma, June 14th, 1922.

Received payment of the tax mentioned in the herewith attached protest and at the same time received a true and correct copy of the hereto attached protest.

Joe Weir, County Treasurer of Ottawa County, Oklahoma.

[File endorsement omitted.]

[fol. 36] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

ORDER OVERRULING DEMURRER—July 8, 1922

Demurrer to petition heard and overruled. Defendant excepts. Defendant elects to stand on demurrer to petition and declines to plead further. Judgment in favor of Plaintiff and against defendant for amount sued for & costs. Defendant excepts. Defendant in

open court in presence of attorney for plaintiff gives notice of intention to appeal, same allowed, all as per journal entry, and further proceedings in the following cases to be stayed pending the decision of Supreme Court in No. 5113: (as per stipulations in each case).

[fol. 37] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

JUDGMENT—August 5, 1922

On this 8th day of July, 1922, the same being a day of the regular May 1922 term of this court, this cause coming on to be heard upon the demurrer to the petition filed herein, both parties in open court through their respective counsel. The demurrer was presented to the court, and the court having heard argument and being fully advised in the premises, does hereby overrule said demurrer, and the defendant excepts to such ruling, and his exception is allowed. That thereupon the defendant in open court elected to stand upon his demurrer, and the court finds that the plaintiff is entitled to the relief prayed for in said petition, to wit, a judgment against said defendant in the sum of \$2,357.60 and 6% interest thereon from date, and for its costs herein expended.

It is therefore the order and judgment of the court that the plaintiff be and is hereby granted judgment against the defendant in the sum of \$2,357.60 and 6 per cent interest thereon per annum from the date hereof, and for its costs herein expended, taxed at \$—. To such judgment the defendant is excepting, and his exception is allowed. The defendant thereupon gives notice in open court in the presence of counsel for the plaintiff of his intention to appeal said cause to the Supreme Court of the State of Oklahoma, and requests that the court direct the Clerk of this court to make an entry of such notice on his journal in this cause, and further requests this court for good cause shown to be given an additional time in which to make and serve transcript of the record herein, and the court for good cause shown grants the additional time of — days from and after this date in which to make and serve transcript of record herein upon counsel for the plaintiff, the plaintiff to have — days after service of said transcript in which to make suggestions of amendment, and same to be settled upon five days' notice by either party.

And the court does further order, adjudge and decree that the defendant herein be and he is hereby authorized and directed to pay to said plaintiff the sum of \$2,357.60 sued for herein, together with 6 per cent interest thereon from date hereof, and the costs of this suit, [fol. 39] and the defendant excepts to such order and direction and such exception is allowed.

S. C. Fullerton, District Judge.

OK. Louis N. Stivers.

[File endorsement omitted.]

[fol. 40] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

ORDER ALLOWING APPEAL—July 8, 1922

Demurrer to Petition heard and overruled, defendant excepts. Defendant elects to stand on demurrer to petition and declines to plead further. Judgment in favor of Plaintiff and vs. Defendant for amount sued for & costs. Defendant excepts. Defendant in open court in presence of attorney for Plaintiff gives notice of intention to appeal to Supreme Court of State and prays an appeal. Same allowed. All as per Journal Entry.

[fol. 41] IN DISTRICT COURT OF OTTAWA COUNTY

[Title omitted]

CLERK'S CERTIFICATE

I, Geo. M. Henderson, Court Clerk for said County, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In Witness Whereof, I have hereunto set my hand and the seal of this court, this 30th day of December, 1922.

Geo. M. Henderson, Court Clerk, by J. W. Dewey, Deputy.
(Seal.)

[fol. 42] [File endorsement omitted.]

[fol. 43] IN SUPREME COURT OF OKLAHOMA

#14059

J. WEIR, ETC.,

vs.

JAYBIRD MINING COMPANY

SUBMISSION OF CAUSE—May 13, 1924

And now on this 13th day of May, 1924, the above cause is submitted on record and briefs filed herein.

[fol. 44]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JUDGMENT—October 21, 1924

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and the cause remanded.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded with directions to proceed consistent with the opinion filed therein.

Opinion by Pinkham, Com'r.

[fol. 45]

[File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

OPINION—Filed October 21, 1924

Syllabus

1. The state has no power to levy an occupation tax upon the agency of the government nor to levy an income tax on the proceeds thereof, but the state has the power and authority to levy a property tax upon the private property of the agent when such property has a situs within the state.
2. Where lead and zinc ores extracted from the lands of restricted Quapaw Indians are stored in the bins of the lessee and assessed for taxation on the day fixed by the laws of the state, such ores, being personalty and private property of the lessee, are not exempt from ad valorem taxation.
3. The tax imposed by section 9814, C. S. 1921, is not upon a federal agency nor upon the right to exercise or operate a federal agency but is upon the lessee's individual private property.

Error from the District Court of Ottawa County, Oklahoma

Hon S. C. Fullerton, Judge

Action by the Jaybird Mining Company against Joe Weir, County Treasurer of Ottawa County, Oklahoma. From judgment in favor of plaintiff, defendant brings error. Reversed.

Reversed.

Clifford W. King, Leon S. Harsh, for the State.

A. L. Commons, John H. Venable, Attorneys for Plaintiff in Error.

A. Scott Thompson, Attorney for Defendant in Error.

[fol. 46]

OPINION BY PINKHAM, C.

This is an appeal from a judgment of the district court of Ottawa County, Oklahoma, in a cause wherein the Jaybird Mining Company, a corporation, was plaintiff, and the plaintiff in error, Joe Weir, County Treasurer of Ottawa County, Oklahoma, was defendant.

The Jaybird Mining Company (hereinafter called "the company") was the lessee of certain lands allotted to one Hum-bah-wat-tah Quapaw, a restricted Quapaw Indian; and, by virtue of said lease, had operated a lead and zinc mine upon said lands. The company paid to the State Auditor a gross production tax on ores produced and sold prior to June 30, 1921, but on January 1, 1921, had ores on hand, unsold, in mass, and the royalty interest of the Indian unsegregated, upon which the plaintiff in error (hereinafter called "county treasurer") assessed an ad valorem tax in the amount of \$2,319.80. This tax was paid, under protest, by the company and suit was instituted to recover same by virtue of the laws of the State of Oklahoma in such cases provided.

The company alleged, in its petition, that by the Act of Congress, of March 2, 1895 (28 Stat. 907), the lands, of which it was lessee, were patented to the Indian under a twenty-five-year restriction, and that, by Act of Congress of March 3, 1921, (41 Stat. 1225, 1248) the restrictions were further extended for an additional period of twenty-five-years. It was further alleged that, by virtue of Act of Congress of June 7, 1897 (30 Stat. 72), the lands of Hum-bah-wat-tah Quapaw were leased to the company by direction and with the approval of the Secretary of the Interior, the owners of the lands (the allottee's heirs) having been declared incompetent and [fol. 47] incapable of managing said estate and the Secretary of the Interior maintaining control through the Quapaw Indian Agency at Miami, Oklahoma. Hence the company alleged that it was carrying out the terms of a Federal Agency in developing the mineral lands of the Indian wards of the Federal Government.

The petition then stated that on January 1, 1921, the ores in the bin on said lands were in mass, the royalty or equitable interest of the Indian not having been segregated or paid, the terms of the lease providing for payment of a royalty or percentage of the gross proceeds derived from the sale thereof. It alleged that the company had paid to the Auditor of the state of Oklahoma a gross production tax on the ores "so assessed when sold, and during the tax year in which same was produced and prior to June 30, 1921," but that the taxing officials of Ottawa County, Oklahoma, assessed the ores in the bins on January 1, 1921, for ad valorem taxation and that such taxing officials caused such ore to be assessed *ad ad valorem* tax in the amount of \$2,319.80.

The company alleged that the taxing officials aforesaid were without authority of law to make such ad valorem assessment, that the tax had been paid under protest, and it prayed judgment for the recovery of such amount so paid.

The county treasurer demurred to said petition, which demurrer, on hearing, was overruled. The county treasurer elected to stand on his demurrer, declined to plead further, and the court thereupon rendered judgment in favor of the company for the amount sued for and costs. From this judgment the county treasurer appeals to this Court.

The one important question to be determined in this appeal is whether the company being the lessee of restricted Indian land is entitled to recover from the county treasurer the taxes paid by it [fol. 48] under protest on the ores which it had extracted from the leased land during the year 1920 and had stored in its bins on the 1st day of January, 1921, by reason of the fact that the lands from which these ores were mined were restricted Quapaw Indian lands leased by and with the consent of the Secretary of the Interior.

It is the theory of the company that it was a federal agency and as such its personal property was non-taxable by the state except as permitted by Act of Congress.

It is the theory of the county treasurer that the status of the company, the lessee of a restricted Indian, cannot be considered as that of such type of a federal instrumentality as to exempt such lessee's personal property from state taxation.

In the briefs of both parties numerous cases decided by this court and by the Supreme Court of the United States are cited in support of the conflicting propositions and in some instances the same cases are relied upon by both the company and the county treasurer.

If the company, operating under a departmental lease, is exempt from taxation upon its personal property—the ores in question, which it is admitted had been severed from the soil and stored in the bins of the company and were in its exclusive control and possession on the day fixed by law for the assessment of property for taxes—it must be by virtue of some statute, state or federal.

All property in this state, whether real or personal, except such as is exempt, shall be subject to taxation. Section 9574, C. S. 1921.

Section 9575, C. S. 1921, enumerates the property that shall be exempt from taxation, but ore in bins is not included therein.

Section 9814, C. S. 1921, provides among other things that "oil in storage, asphalt, and ores bearing the minerals hereinbefore [fol. 49] named, mined, produced, and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time * * *."

Under no statute of this state was the property involved in this case exempt from taxation.

By the Act of June 7, 1897 (30 Stat. L. 72) it is provided that "the allottees of land within the limits of the Quapaw agency, Indian Territory, are hereby authorized to lease their lands or any part

thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining or business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers, and help from time to time as they may deem necessary; provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability of any such allottee he cannot improve or manage his allotment properly and with benefit to himself the same may be leased in the discretion of the Secretary, upon such terms and conditions as shall be prescribed by him."

The lands in question were leased by the Secretary of the Interior to the company under the second proviso of the Act.

Whatever the terms of the company's lease under the provisions of the Act it seems to us clear that it does not either expressly or by necessary implication exempt from taxation the personal property of Quapaw Indians or personal property of the lessee consisting of minerals severed from the land.

The power to tax is an attribute of sovereignty so vital to the [fol. 50] existence of the state that it may be exercised without restriction unless expressly prohibited. *Moose v. Board Comrs.*, 172 N. C. 1990 S. E. 441.

In *Edy v. Meath*, 203 U. S. 146, 51 L. Ed. 130, it is said: "His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens and the rule of exemption for must be the same as for other citizens; that is, no exemption exists by implication but must be clearly manifested."

In the case of *In re Skelton Lead & Zinc Co.'s Gross Production Tax for 1919*, 81 Okla. 134, 197 Pac. 495, the exact proposition raised by the company in the case at bar was decided adversely to its contention. In that case it was held that "the tax imposed by section 39, Sess. Laws (Extra Session) 1916 (Section 9814, C. S. 1921) is not upon said agency nor upon the right to exercise or operate a federal agency but is upon the lessee's individual private property."

In the case of *Protest of Bendelari Gross Tax of 1919*, 82 Okla. 97, 198 Pac. 606, this court held "No constitutional implications prohibit a state tax upon property of an agent of the government merely because it is the property of such agent."

Counsel for the company contend that the Supreme Court of the United States, in the case of *State v. Gillespie*, 257 U. S. 501, in effect denied the soundness of the ruling of the Skelton case and that no authority other than that case is required to sustain the company's proposition, which, as we understand it, is that the ores in question produced by the company on January 1, 1921, are exempt from any tax burden sought to be imposed by the state because the lease and lessee constitute a federal instrumentality determined by the national government as the means of carrying out its obligations to Quapaw Indians.

[fol. 51] It is, we think, sufficient to say that nothing said in the case relied upon detracts from the decision in the Skelton case with respect to the right of the state to impose an ad valorem tax upon personal property produced by a lessee of restricted Indian land

where such property is found within the state on the day fixed by law for the assessment of property.

What the Gillespie case decided was that the income accruing from property (the lease), which is exempt from taxation, may not be taxed by the state.

It is said in the opinion: "The only question in the case is whether he (the lessee) is liable to this kind of a tax". The kind of a tax involved in the Gillespie case was an income tax obviously distinct from an ad valorem tax on tangible private personal property.

To make it clear that the Gillespie case was limited solely to "incomes" it is said in the concluding part of the opinion: "Whether this property could be taxed in any other form or not it cannot be reached as profits or income from leases such as those before us."

The right of the state to impose taxes upon personal property having a situs within the state's limits, notwithstanding the fact that the title to the land from which minerals are taken was in the United States, was upheld in *Forbes v. Gracey*, 94 U. S. 762, in which case it was said by Mr. Justice Miller: "The moment this ore becomes detached from the soil in which it is imbedded it becomes personal property and the ownership is in the man whose labor capital and skill has discovered and developed the mine and extracted the ore or other mineral products. It is then free from any lien, claim, or title of the United States, and is rightly subject to taxation by the state as any other personal property."

[fol. 52] "Such in interest from early times has been held to be property distinct from the land itself; i. e. vendable, inheritable, and taxable." *Elder v. Wood*, 208 U. S. 226, 227.

In the case of *Choctaw, etc., Ry. Co. v. Harrison*, 235 U. S. 292, 59 L. Ed. 234, it is said in the opinion: "But it is insisted that the statute rightly understood prescribes only an ad valorem imposition on the personal property owned by appellant—the coal at the pit's mouth—which is permissible according to many opinions of this court." *Thomson v. Pacific Ry. Co.*, 9 Wall. 479; *Union Pacific Ry. Co. v. Peniston*, 18 Wall. 5; *Central Pacific Ry. Co. v. California*, 162 U. S. 91; *Thomas v. Gay*, 169 Pac. 264.

In *Union Pacific Ry. Co. v. Peniston*, and *Thomas v. Gay*, *supra*, it was held that a state or territory might properly levy a tax upon private property used under federal authority on Indian reservations.

The taxes here involved were not imposed upon the business of the lessee or upon the royalty received by the Indian but upon the ore as personal property, which the company had extracted from the soil and had stored in its bins and as held in *Thomas v. Gay*, *supra*. "Such a tax is too remote to be regarded as an interference with the legislative power of Congress."

Such a tax, we think, could in no way hamper the federal government in carrying out its duties to the Indian ward.

So far as the proposition that the Indian had an unsegregated interest in the ores is concerned it is stated in the company's petition that the terms of the lease gave no royalty interest in the Indian prior to the sale of ores in question; that the lease provided that the Indian should receive a percentage of the gross proceeds of

[fol. 53] the sale of the ore. It will be seen, therefore, that the title to the ore in the bins was completely in the company and the company would be liable for the tax to the full value and no deduction would be properly made for the undetermined interest that would accrue to the Indian from the proceeds of the sale when made by the company. In other words, there was no attempt to tax the royalty interest of the Indian. The Indian would receive his royalty according to the allegation of the petition when the ores were sold by the company.

We conclude that the taxes here involved were not upon the lease or upon the occupation of the lessee company or upon its income derived from the lease but simply an ad valorem tax such as is imposed annually upon the property of all other citizens of the state pursuant to its laws and that the judgment of the trial court overruling the demurrer of plaintiff in error and rendering judgment in favor of the Jaybird Mining Co. in the sum of \$2,357.60 should be reversed and the cause remanded with directions to enter judgment sustaining the demurrer of the county treasurer, plaintiff in error herein.

[fols. 54 & 55] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed November 6, 1924

Comes now Jaybird Mining Company, defendant in error, and respectively represents to the court that on October 21, 1924, an opinion was rendered by this Court in the above entitled and numbered cause reversing the judgment and ruling of the District Court of Ottawa County, Oklahoma, theretofore rendered in the above entitled cause, in said District Court, which ruling and judgment in said District Court was in favor of this defendant in error and against the above named plaintiff in error; and said judgment as rendered by this [fol. 56] Court directs the trial court to enter judgment sustaining the demurrer of plaintiff in error, theretofore overruled.

That the decision of this Court as contained in its opinion filed October 21, 1924, and referred to in the foregoing paragraphs hereof, overlooked questions decisive of the case and duly submitted by counsel as follows:

First. The taxing power of the state is limited to those subjects over which its sovereignty extends. Those subjects over which the state is not sovereign is beyond reach of the State for taxation purposes without express exemptions by law.

Second. Defendant in error in its brief expressly presented the question that the lease itself being an admitted Federal instrumentality was free from tax by the state and therefore the product or

income therefrom was likewise exempt from tax. This was neither discussed nor passed upon by this Court.

This is an appeal from a judgment of the District Court of Ottawa County, Oklahoma, in a cause wherein the Jaybird Mining Company, a corporation, was plaintiff, and the plaintiff in error, Joe Weir, county treasurer of Ottawa County, Oklahoma, was defendant. The controversy grows out of an attempt on the part of the taxing officials of Ottawa County, Oklahoma, to tax lead and zinc ores in the [fol. 57] bins at the mines of defendant in error before the same had been sold, said ores having been produced from certain restricted allotted Quapaw Indian lands, pursuant to lease executed to defendant in error under authority of an Act of Congress of June 7, 1897 (30 Stat. L. 907), the restrictions on said lands having been further extended by Act of Congress March 3, 1921 (41 Stat. L. 1225-48). The tax attempted to be levied under the alleged authority of Sec. 9814, Com. Stats. Oklahoma 1921.

The taxes in question were paid under protest and suit brought against the county treasurer within the time provided by law for their recovery, the company alleging that the taxing officials were without authority of law to make such assessment and collection, such want of authority being by reason of the alleged fact that the defendant in error in carrying out the terms of its lease was a Federal agency, and the tax in question was an illegal interference with such agency and for the further reason that the lease itself being exempt, the income therefrom was likewise exempt. The plaintiff in error demurred to said petition, which demurrer on hearing was [fol. 58] overruled. The county treasurer elected to stand on his demurrer and judgment was thereupon rendered in favor of the plaintiff, defendant in error here.

In the opinion of the learned Commissioner, Mr. Commissioner Pinkham, it is found that the property in question is subject to taxation for the reason:

"All property in this state, whether real or personal, except such as is exempt, shall be subject to taxation. Section 9574, Com. Stat. Okla. 1921.

"Sec. 9575, Com. Stat. 1921, enumerates the property that shall be exempt from taxation, but ore in bins is not included therein."

We submit that while it is true that in express words "ore in bins" is not exempted from taxation, yet the mere fact that a specific kind of property is not in words exempted, does not conclude the matter. We submit that there is no question but that leases on restricted Indian lands are exempt from taxation. In *re Indian Territory Illuminating Oil Co. v. Oklahoma*, 43 Okla. 307, 142 Pac. 997. And as to the proposition that the leases in the last mentioned case were not taxable see *Indian Territory Illuminating Oil Co. v. Okla.*, [fol. 59] 240 U. S. 522, 60 Law. ed. 779, 36 Supreme Court Reporter 453, yet leases on restricted Indian lands are not expressly exempted by the statute referred by the learned Commissioner.

The facts are that under Section one of the Enabling Act (334 Stat. L. 367) the State of Oklahoma is expressly prohibited from impairing the rights of property pertaining to the Indians in said territories or to limit or affect the authority of the government of the United States in carrying out its agreements and treaties with such Indians. In *Indian Territory Illuminating Oil Co. v. Oklahoma*, supra, the act under which the leases were made was as follows:

"By the act of 1891 it was provided: 'That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.' Com. St. 1913, Sec. 4218."

The Act of Congress under which the leases under consideration in the case at bar were executed is as follows:

[fol. 60] "By the Act of June 7, 1897 (30 Stat. L. 72), it is provided that:

"The allottees of land within the limits of the Quapaw agency, Indian Territory, are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes or ten years for mining or business purposes; and said allottees and their lessees and tenants shall have the right to employ such assistants, laborers and help from time to time as they may deem necessary; provided, that whenever it shall be made to appear to the Secretary of the Interior that by reason of age or disability of any allottee he cannot improve or manage his allotment property and with benefit to himself the same may be leased in the discretion of the Secretary upon such terms and conditions as shall be prescribed by him."

It will be seen that there is no distinction in the authority of the government to make such contract, and it can hardly be conceived that the Supreme Court of the United States would construe the rights of the lessees granted under either of the acts above quoted in any different manner. In *Indian Territory Illuminating Oil Co. v. Oklahoma*, supra, in passing upon the taxability of a lease executed under the Act of Congress quoted above the court says, after referring approvingly to the case of *C., O. & G. R. R. Co. v. Harrison*, 235 U. S. 292 59 Law. ed. 234, 35 Supreme Court Reporter [fol. 61] 27, a case in which it was held that the gross receipts law as applied to coals mined from restricted Indian lands in Oklahoma was invalid as an attempt to tax an instrumentality of the United States.

"A tax upon the leases is a tax upon the power to make them could be sued to destroy the power to make them. * * *

"It follows from these views that the assessment against the oil company so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company is invalid."

We believe that the learned Commissioner overlooked the distinguishing factor to be used in determining the taxing power of the state. This factor is plainly presented in the case of *Weston v. Charleston*, 2 Peters 449, 7 *Lad. ed.* 481, cited in brief of defendant in error at page 12, in which case Mr. Chief Justice Marshall says:

"All subjects over which the sovereign power of a state extends are objects of taxation but those over which it does not extend are upon the soundest principles exempt from taxation.' 'The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission;' but not 'to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.'"

[fol. 62] Undoubtedly this must have been in the minds of the writers of the Enabling Act when they expressly provided that the new State of Oklahoma could not limit or effect the authority of the government of the United States in respect to its dealing with the Indians and their property.

However, the learned Commissioner in the case at bar would separate for purposes of taxation the ore after it was produced but before it was sold, and before the Indian has received his royalty, into a separate form of property for the purpose of taxation. This is attempted for the obvious reason that inasmuch as in the opinion of the Commissioner, the exact proposition raised in the case at bar, had been passed upon in the case of *In re Skelton Lead & Zinc Company Gross Production Tax*, 81 *Okla.* 134, 197 *Pac.* 495, in which it was conceded that the "operation of this character of lease is a Federal instrumentality * * *" And the attorneys for plaintiff in error in their brief, at page 10, having conceded that the lease in question was a Federal instrumentality and the Supreme Court of the United States in the case of *Gillespie v. Oklahoma*, 257 *U. S.* 501, 66 *Law. ed.* 338, having held that the income from such a lease was [fol. 63] exempt the only possible method to tax the property in the case at bar was to call it a separate taxable entity.

This position, while in our opinion untenable, is obviously taken in attempting to follow the arguments of the learned Attorney General in this case and in the case of *Gillespie v. Oklahoma*, *supra*. In the case of *Gillespie v. Oklahoma*, *supra*, it was contended by the learned Attorney General that the income from the restricted leases held by the lessee was a separate taxable entity. In the brief in the *Gillespie* case filed in the Supreme Court of the United States by the Attorney General of the State of Oklahoma, page 6, it is said:

"Income has been set apart and classified by the Legislature as a separate and independent taxable entity, regardless of its source, and

for the purpose of taxation such income has no relation to any particular property or business.

"It will be seen from the above that income taxation is distinguishable from other forms in that the tax is assessed upon income, as such, instead of upon the property or the operation of a trade, business or profession from which said income may have been derived."

This is so obviously an untenable position that the Supreme Court of the United States in the Gillespie case, *supra*, does not so much as [fol. 64] mention it. Since the case of *Pollock v. Farmer's Loan & Trust Co.*, 157 U. S. 429, rehearing denied, 158 U. S. 601, it has no longer been open to question, but that upon income is a tax upon the principal from which such income is derived. Mr. Chief Justice Field in his opinion in the *Pollock* case (157 U. S. at page 591), says:

"It must be conceded that whatever affects any element that gives an article its value, in the eyes of the law, affects the article itself."

In the face of these opinions how can it be said that a tax upon the very thing (ore) from which the income is to be received, will not affect such income or amount to a tax upon the income? To ask the question is to answer it.

The learned Commissioner says:

"In the case of *In re Skelton Lead & Zinc Co.'s Gross Production Tax for 1919*, *supra*, the exact proposition raised by the company in the case at bar was decided adversely to its contention."

We do not agree with the Commissioner in this, for the reason that the tax in question, as shown by the title of the case in the last mentioned case, was a gross production tax, in the present case it is an attempt to levy an *ad valorem* tax. However, we concede that if the case last above mentioned is the law as to gross production from these restricted Indian lands, the learned Commissioner is probably right in his decision in the case at bar. It is further said in the opinion in the case at bar that it was the contention of defendant in error that the ruling in the *Skelton* company case was not sound in view of the decision in the case of *Oklahoma v. Gillespie*, *supra*. This is a correct statement. The facts with reference to the Gillespie case and the *Skelton Lead & Zinc Company's* case are best shown by a quotation from the opinion of the Supreme Court of Oklahoma in *State v. Gillespie*, 81 Okla. 103, 197 Pac. 508:

"As to the second proposition, the question of validity of the precise tax here involved depends primarily upon the validity of the gross production tax provided for in Chap. 39, Sess. Laws 1916, as applied to the lessee's private share of the products from departmental leases upon restricted lands, and the gross production tax being a property tax, as was held by the Supreme Court of the United States in *Shaffer v. Carter*, *supra*, the validity of which, as a prop-

erty tax upon the same class of property here involved, was sustained by this court at this term in *Re Protest of Skelton Lead & Zinc Co.* (No. 11194), 197 Pac. 945, not yet (officially) reported, then, upon the authority of said cases and the reasons therein given, the validity [fol. 66] of the income tax involved herein is sustained."

It must be apparent from the above statement that unless the decision of the Supreme Court of Oklahoma could stand in the Gillespie case it cannot stand in the Skelton case, this for the obvious reason that "upon authority of said cases and the reasons therein given, the validity of the income tax involved herein is sustained." The Supreme Court of the United States in the Gillespie case, *supra*, expressly reversed the Supreme Court of Oklahoma, saying:

"The conditions that invalidate a tax upon the leases invalidates the tax upon the profits of the leases; and stopping short of theoretical possibility, a tax upon such profits is a direct hamper upon the efforts of the United States to make the best terms it can for its wards."

The defendant in error in the case at bar further contends that the opinion as delivered by the learned Commissioner in the case at bar is in direct conflict with the opinion of the Supreme Court of the United States in the case of *Gillespie v. Oklahoma*, 257 U. S. 501, *supra*. And that said decision in the Gillespie case is decisive and [fol. 67] controlling upon the question at bar. In considering the Gillespie case the learned Commissioner says "the only question in the case is whether he (the lessee) is liable to this kind of a tax." The exact language of Mr. Justice Holmes in the Gillespie case, *supra*, in the sentence partially quoted by the learned Commissioner is:

"It is agreed that the lessee was an instrumentality used by the United States in carrying out duties to the Indians that it had assumed, and that the only question in the case is whether he is liable to this kind of tax."

Further on in the opinion by the learned Commissioner in this court in the case at bar it is said:

"The kind of a tax involved in the Gillespie case was an income tax, obviously distinct from ad valorem tax on tangible private personal property."

The fact is that as a question of law there could be no distinction between the kinds of tax called into question by the learned Commissioner as is decisively passed upon in *Pollock v. Farmer's Loan & Trust Co.*, *supra*, and *Brushaber v. Union Pacific Ry.*, 240 U. S. 1. And it must be obvious to this court that to say that you cannot tax the income from this lease but you can tax the very thing from [fol. 68] which the income is to be derived (and thereby absolutely deprive the lessee of any income) would be ridiculous. The reason

X the income cannot be taxed is, according to the Supreme Court of the United States " * * * a tax upon such profits is a direct hamper upon the efforts of the United States * * *." However, as we understand the Gillespie opinion as written by the Supreme Court of the United States, the State of Oklahoma there conceded that a tax upon the income of Gillespie as received from his leases on restricted Indian lands was a tax upon his (Gillespie's) share of the oil and gas. In other words, it was identically the kind of a tax that is attempted in this case. Certainly there could be no reason why the State could not tax the money derived from the sale of the ore if it could tax, as contended for by the plaintiff in error in the case at bar, the very thing from which the money was to be received. Referring again to the Gillespie case in the Supreme Court of the United States to show what was really before the court, Mr. Justice Holmes, in going over the arguments and contentions of the State of Oklahoma, says:

[fol. 69] "It is said also that tangible property within the state is subject to taxation, and that therefore the defendant's share of oil and gas cannot escape."

All this must have been the view of the Supreme Court of Oklahoma before the Supreme Court of the United States reversed said court in the Gillespie case, for Mr. Justice Harrison said in the Gillespie case in the Oklahoma Supreme Court:

" * * * the question of validity of the precise tax herein involved depends primarily upon the validity of the gross production tax provided for in Chap. 39, S. L. 1916, to the lessee's private share of the products from Departmental leases upon restricted lands * * *."

It is therefore only too apparent that in the Gillespie case and in the case at bar the State of Oklahoma, through its taxing officials, was and is attempting to levy such a tax upon leases on restricted Indian lands and the products therefrom, as will amount to a hampering of the efforts of the United States.

We have endeavored to show in this brief petition that the decision of the learned Commissioner in the case at bar is in conflict [fol. 70] with the controlling decisions of the Supreme Court of the United States, and that such decisions are controlling upon this court. The question involved in this case is one that has been before the Supreme Court of the United States a number of times, in *C. O. & G. R. R. Co. v. Harrison*, *supra*; in *Indian Territory Illuminating Oil Co. v. Oklahoma*, *supra*; in *Howard v. Gypsy Oil Co.*, 247 U. S. 503; in *Large Oil Co. v. Howard*, 248 U. S. 549, and in *Gillespie v. The State of Oklahoma*, *supra*.

In each and every one of the numerous appeals upon this question the alleged right of the State to tax these "admitted" Federal instrumentalities has by the Supreme Court of the United States been vigorously denied. As was suggested to the Honorable Commission-

ers upon the oral argument of this cause in this court, there are at this time a large number of cases now pending in the district court of Ottawa County, Oklahoma, in which this identical question is involved. It would be an unnecessary expense upon both the State and the defendants in error to again take this question to the Supreme Court of the United States. We therefore respectfully pray [fols. 71 & 72] that a rehearing of said cause be granted by this Honorable Court; that said cause be set for oral argument before the Supreme Court of this State, in order that both the plaintiff in error and defendant in error may present this vital question, construction of the Enabling Act, and the various Federal statutes under which these lands were allotted and leased, to the Justices of the Supreme Court of the State of Oklahoma.

A. Scott Thompson, Attorney for Defendant in Error. A. C. Wallace, Vern E. Thompson, Ray McNaughton, all of Miami, Okla., of Counsel.

[fol. 73]

IN THE SUPREME COURT OF OKLAHOMA

No. 14059

JOE WEIR, County Treasurer of Ottawa County, Oklahoma, Plaintiff
in Error,

vs.

JAYBIRD MINING COMPANY, a Corporation, Defendant in Error

MOTION FOR ORAL ARGUMENT ON PETITION FOR REHEARING

Comes now the Jaybird Mining Company, defendant in error herein, and moves this Honorable Court that oral argument be heard in the presentation of its petition for rehearing in the above styled cause attached hereto and further moves that this matter be heard before the Supreme Court for the following reasons:

This case involves the sustaining or overruling of a judgment of the District Court of Ottawa County, Oklahoma which, in effect, necessarily held that a former opinion of this Supreme Court had been in principle overruled by the Supreme Court of the United States.

[fol. 74] Attorneys for the defendant in error represent to the Supreme Court that this is a test case and is presented to the court upon the theory that its former holding *In re Skelton Lead & Zinc Company Gross Production Tax*, 81 Okla. 134, has been reversed by the Supreme Court of the United States in the case of *Gillespie v. State of Oklahoma*, 257 U. S. 501. They further represent that there are a large number of cases held in the District Court of Ottawa County, Oklahoma, awaiting the final decision in this case and that it involves a question of importance to the County of Ottawa and the lead

and zinc industry and the administration of Indian Affairs in the State of Oklahoma. For these reasons and particularly because the attorneys for the defendant in error are urging that this Court should overrule its former opinion in the Skelton case upon the authority of *Gillespie v. State of Oklahoma*, this petition for rehearing should be presented to the Supreme Court and oral argument should be had thereon.

A. Scott Thompson, Attorney for Defendant in Error. A. C. Wallace, Vern E. Thompson, Ray McNaughton, all of Miami, Okla., of Counsel.

[fol. 75] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—December 9, 1924

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

[fol. 76] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING MANDATE—Filed December 13, 1924

The above matter coming on to be heard upon the application of defendant in error for stay of issuance of mandate until appeal papers may be prepared and submitted,

It is the order of this Court that issuance of mandate herein to the lower court be and the same is hereby stayed until January 9, 1925.
N. E. McNeill, Chief Justice.

[fol. 77] IN SUPREME COURT OF OKLAHOMA

CLERK'S CERTIFICATE

I, William M. Franklin, clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 76 pages, numbered from 1 to 76, both inclusive, are a full, true and complete transcript of the record and all proceedings had in cause number 14,059, entitled Joe Weir, County Treasurer of Ottawa County, Oklahoma, Plaintiff in error, versus Jaybird Mining Company, a corporation,

Defendant in error, as the same remains of record and on file in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Supreme Court, at Oklahoma City, Oklahoma, this 15th day of January, 1925.

Wm. M. Franklin, Clerk Supreme Court Oklahoma, by Jessie Pardoe, Deputy. (Seal Supreme Court, State of Oklahoma.)

Endorsed on cover: File No. 30,894. Oklahoma Supreme Court. Term No. 929. Jaybird Mining Company, plaintiff in error, vs. Joe Weir, as county treasurer of Ottawa County, Oklahoma. Filed February 24th, 1925. File No. 30,894.